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In the

Supreme Court of the United States

OCTOBER TERM, 1969

PETER ROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

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OPINION OF THE COURT BELOW

The opinion of the Illinois Appellate Court, First District, entered December 18, 1968, is reported at 103 Ill. App. 2d 430, and is reprinted herein in the printed appendix and in the record filed simultaneously herewith, and certified by the Clerk of the Illinois Appellate Court, First District.

The Petition for Rehearing was denied on January 23, 1969, and the order denying said petition is set forth in the certified copy of the record.

The Supreme Court of Illinois denied a Petition for Leave to Appeal Without Opinion on March 24, 1969. The Order denying said Petition for Leave to Appeal is set forth in the certified copy of the record.

STATEMENT OF JURISDICTION

The Order of the Illinois Appellate Court, First District, was entered on December 18, 1968, reversing in part the judgment of the Circuit Court of Cook County, Illinois. On the 23rd day of January, 1969, it was ordered by that Court that the Petition for Rehearing be denied.

A Petition for Leave to Appeal in the Supreme Court of Illinois was denied on March 24, 1969. The Petition for a Writ of Certiorari is filed within ninety (90) days from said March 24, 1969.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure to advise the petitioner of his right to a hearing in mitigation and aggravation is violative of due process?

2. Whether the Courts of the State of Illinois in affirming petitioner's conviction have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the Constitution of the United States "AMENDMENT V—INDICTMENT BY GRAND JURY;

DOUBLE JEOPARDY; WITNESS AGAINST HIMSELF; DUE PROCESS; EMINENT DOMAIN

". . . nor be deprived of life, liberty or property, without due process of law; . . ."

Fourteenth Amendment to the
Constitution of the United States

"AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES: DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

"Section 1 . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

Article 2, Section 2, Constitution State of Illinois

NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.

Chapter 38, Section 1-7 (g) Ill. Rev. Stats., 1967

"For the purpose of determining sentence to be imposed, the Court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation and mitigation of the offense.

Illinois Supreme Court Rule 615 (b) (4)

POWERS OF THE REVIEWING COURT. On Appeal the reviewing Court may: . . . (4) Reduce the punishment imposed by the trial Court.

Chapter 38, Section 9-2(c) Ill. Rev. Stats., 1967

A person convicted of voluntary manslaughter shall be imprisoned in the penitentiary from one to twenty years.

Chapter 38, Section 8-4 (c) (1) Ill. Rev. Stats., 1967

" . . . the penalty for attempt to commit treason, murder or aggravated kidnapping shall not exceed imprisonment for twenty years."

STATEMENT OF THE CASE

This action began by the filing of an indictment against this petitioner, charging the offenses of murder and attempted murder in violation of Chapter 38, Sections 9-1, and 8-4.

The petitioner was found guilty of voluntary manslaughter and attempted murder and the trial court thereupon imposed concurrent sentences of two to fourteen years in the Illinois State Penitentiary. This penalty is for a term of punishment greater than the minimum term for the offense of voluntary manslaughter as set forth under Ill. Rev. Stats. Chapter 38, Section 9-2 (c) 1967. There is no minimum penalty for attempts in the State of Illinois. Ill. Rev. Stats. Chapter 38, Section 8-4 (c) (1). The trial court imposed this penalty in view of the convictions on two charges.

However, on December 18, 1968, the Appellate Court of Illinois reversed the conviction for attempted murder and affirmed the conviction for voluntary manslaughter. At this time a Petition for Rehearing was filed raising the issue that the sentence of the trial court was improperly imposed in direct violation of statute in that the petitioner had never been advised by either the trial court

or his public defender of the right to a hearing in aggravation and mitigation.

The record at page 83 of the transcript of the proceedings clearly shows that petitioner was never extended the right to such a hearing during the sentencing:

> ". . . So there will be a finding of guilty of voluntary manslaughter to Indictment No. 65-1958 and a finding of guilty as to the first count in Indictment 65-1965. How old are you?
>
> The Defendant: I will be 54 next April.
>
> The Court: Motion for new trial, a motion in arrest of judgment will be denied. Here is a man that has never been arrested before, always evidently enjoyed a good reputation. As he said he was never in a court room or never before a judge before.
>
> The Defendant: I have a fine work record for thirty years.
>
> The Court: The court couldn't grant you probation under these circumstances. I mean here is one person cut and the other person loses her life.
>
> Mr. Oplatka: The State would recommend here, Your honor, eight to twenty.
>
> The Court: Eight to what?
>
> Mr. Oplatka: Eight to twenty in the Illinois State Penitentiary.
>
> The Court: Well, here is a man that is 53 years of age. Chances are he wouldn't make the 20. He hasn't too many years span of life. I want to give an opportunity to go out and to adjust his life. I mean he evidently loved the woman and it's one of those things—
>
> The Defendant: I love the children very much.
>
> The Court: He loves the children. The Court will sentence you to the Illinois State Penitentiary at Joliet, Illinois, I will fix a minimum of two years and a maximum of fourteen years.
>
> Mr. Cawley: Thank you Judge.
>
> Mr. Oplatka: Are those to be concurrent?

The Court: On each case to run concurrent.
Mr. Cawley: Could the Court set a day to file—
The Court: Thirty days to file Notice of Appeal.
Mr. Cawley: Could we set the mittimus to the same thing?
The Court: Stay the mittimus for thirty days. Stay the Mittimus to September 15th, 1966.

(Which were all the proceedings had and evidence offered in the above entitled cause)

The Petition for Rehearing was denied. This was a direct violation of the petitioner's right to due process under the Constitution of the United States and the Constitution of the State of Illinois. The question was then timely presented to the Supreme Court of Illinois in a Petition for Leave to Appeal which was denied without written opinion.

Prior to the time this matter was tried the defendant had already spent fourteen months in the Cook County jail while being held without bond on a murder charge. Recognizing that the record is deficient, we urge this Honorable Court accept that until the time of his arrest on the charges, the petitioner has never had any contact with the law outside of an occasion traffic violation. He was an outstanding citizen in every respect holding a good job with the same employer for twenty-five years.

These facts would only be available through a hearing in mitigation and aggravation. Since the petitioner was deprived of his right to a hearing the sentence of the trial court was imposed in a vacuum.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiotrari to review the denial of the Petition for Leave to Appeal by the Supreme Court of Illinois for the following reasons:

1) The lack of a hearing in mitigation and aggravation as provided for in the Code of Criminal Procedure Chapter 38, Section 1-7 (g) Ill. Rev. Stats. 1967 at the conclusion of the trial before the imposition of sentence upon the Petitioner herein violates his right to due process under the 5th and 14th Amendments to the Constitution of the United States and Article 2, Section 2, Constitution of the State of Illinois.

2) The Supreme Court of Illinois has sanctioned the complete departure from the accepted and usual course of judicial proceedings applicable to the sentencing process by not granting the Petition for Leave to Appeal heretofore filed in this cause.

I.

The code of Criminal Procedure, Chapter 38, Section 1-7 (g) Ill. Rev. Stats., 1967 specifically provides for a hearing in mitigation and aggravation before the sentence of a convicted defendant is rendered by the Court. The Illinois Appellate Court, in one of the first interpretations of the statute involved, herein recognized that it was the legislature's intent that this information, referring to information in mitigation or aggravation, must be obtained in all cases and that this was apparent from the language of the statute which states that the Court "shall" hear such evidence. *People* v. *Evrard,* 55 Ill. App. 2d 270, 274, 275. It was later held "that it was mandatory for the court to hear evidence as to aggravation and mitigation of the defense if such a request was made by the State or

the defendant, but not otherwise." *People* v. *Smith,* 62 Ill. App. 2d 73, 78. This was the first interpretation by the Court that contemplated the possibility of a waiver of the right to a hearing in mitigation and aggravation. The Court in making its decision in the *Smith* case was looking at the interpretation of a similar statute existing prior to the criminal statute passed in 1967.

In *People* v. *Harris,* 66 Ill. App. 2d, 46, 53 the question of waiver again appeared and the Court followed the position of the *Smith* case "subject to the limitation that a defendant should not be deemed to have waived a statutory right in the absence of evidence that he was aware of that which he is supposed to have waived." Further, in *People* v. *Smice,* 79 Ill. App. 2d, 348, 352, the Court expressed the opinion that it was the 'spirit and intent of section 1-7 (g) that the court hearing on aggravation and mitigation is mandatory unless understandingly waived by the defendant and not requested by the State." *People* v. *Sessions,* 95 Ill. App. 2d, 17.

It has been clearly established that a defendant cannot, be deemed to have waived his right to a hearing in mitigation and aggravation if he was not advised of his right to have such a hearing. The record in this case shows that during the course of the entire proceeding the Petitioner, Peter Ross, was at no time ever advised or counseled of the right to a hearing in mitigation and aggravation. The following is an excerpt from the record, showing the entire sentencing procedure:

> ". . . So there will be a finding of guilty of voluntary manslaughter to Indictment No. 65-1958 and of finding of guilty as to the first count in indictment 65-1965. How old are you?
>
> The Defendant: I will be 54 next April.

The Court: Motion for a new trial, a motion in arrest will be denied. Here is a man that has never been arrested before, always evidently enjoyed a good reputation. As he said he was never in a court room or never before a judge before.

The Defendant: I have a fine work record for thirty years.

The Court: The court couldn't grant you probation under these circumstances. I mean here is one person cut and the other person loses her life.

Mr. Oplatka: The State would recommend her, Your honor, eight to twenty.

The Court: Eight to what?

Mr. Oplatka: Eight to twenty in the Illinois State Penitentiary.

The Court: Well, here is a man that is 53 years of age. Chances are he wouldn't make the 20. He hasn't too many years span of life. I want to give an opportunity to go out and to adjust his life. I mean he evidently loved the woman and it's one of those things—

The Defendant: I love the children very much.

The Court: He loves the children. The Court will sentence you to the Illinois State Penitentiary at Joliet, Illinois, I will fix a minimum of two years and a maximum of fourteen years.

Mr. Cawley: Thank you Judge.

Mr. Oplatka: Are those to be concurrent?

The Court: On each case to run concurrent.

Mr. Cawley: Could the Court set a day to file—

The Court: Thirty days to file Notice of Appeal.

Mr. Cawley: Could we set the mittimus to the same thing?

The Corut: Stay the mittimus for thirty days. Stay the Mittimus to September 15th, 1966.

(Which were all the proceedings had and evidence offered in the above entitled cause)

When the Court proceeded to impose the sentence no mention of a right to a hearing in mitigation and aggrava-

tion was made to the petitioner. There is no evidence at all to the effect that the petitioner was aware that he had a statutory right which could be waived if not exercised timely. That is precisely why the courts placed the burden upon the State to show that a defendant expressly and understandingly waived his right to such a hearing in mitigation and aggravation. *People* v. *Sessions,* 95 Ill. App. 2d 17, 27; *People* v. *Walker,* 103 Ill. App. 2d, 308, 314.

We submit that the basic question respecting waiver of the right to a hearing in mitigation and aggravation is within the scope of this Court's interpretation of waiver regarding the basic guarantees of a right to counsel under the 6th amendment to the Constitution of the United States of America and the use of confessions in violation of the 5th Amendment to the Constitution of the United States of America. This Court has firmly held that before waiver of such a fundamental right will be accepted the State must show that the defendant acquiesced with knowledge that he had such a right and that he showed this acquiescence with some affirmative word or act. *Carnely* v. *Cochran,* 369 U.S. 506, 514, 82 5 Ct. 884; *Von Molke* v. *Gillies,* 332 U.S. 708, 723, 68 S. Ct. 316; *Johnson* v. *Zerbst,* 304 U.S. 456, 464, 58 S.Ct. 1019; *Miranda* v. *Arizona,* 384 U.S. 436, 86 Ct. 1602. This Court in *Miranda* v. *Arizona,* 384 U.S. 436, 86 Ct. 1602, in discussing the question of when waiver of a substantial right shall be accepted as voluntarily made by a defendant stated "presuming waivers from a silent record is impermissible. The record must show or there must be an allegation and evidence which shows that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." I must reiterate that the

record in this case is silent and nowhere does it show any evidence that the petitioner was ever offered a hearing in mitigation and aggravation whereby it can be established that the petitioner *intelligently* and *understandingly* waived the right he possessed. With this point as an established fact the Supreme Court of Illinois has in effect made a decision which is in direct conflict with applicable decisions of this Court by refusing to hear this question.

II.

It is evident from the record that the defense counsel did not request a hearing in mitigation and aggravation at the time of the trial and that the petitioner had no knowledge such a right existed. However, under Illinois Supreme Court Rule 615, Chapter 110A Ill. Rev. Stats., 1967:

> "Plain errors or defects *affecting substantial rights* may be noticed although they were not brought to the attention of the trial court."

Subparagraph (b) (1) and (4) of that section provides that a reviewing court has the power to "reverse, affirm, or modify the judgment or order from which the appeal is taken," and or "reduce the punishment imposed by the trial court; . . .". There is no question that anything which affects a man's freedom from imprisonment must be held to involve a "substantial right". *People* v. *Walker*, 55 Ill. App. 2d, 292, 302, 303.

Even though a hearing in aggravation and mitigation was not requested after the conclusion of the trial this should not preclude your petitioner from raising the issue on appeal. A hearing in aggravation and mitigation, through the Illinois court's own interpretations over the

years, has a definite bearing upon the sentencing procedure. Since the sentencing procedure involves the substantial right of an individual's freedom he must be afforded an opportunity to raise error arising during the sentencing process for the first time on appeal. This argument can be carried beyond the bounds of the state statute involved since the constitutional guaranty of due process hangs heavy over the entire proceeding. This Court has stated that the purpose of a constitutional guaranty was to protect the individual from conviction due to his own unfortunate ignorance of his right under the law. *Johnson* v. *Zerbst,* 58 S. Ct., 1023. Surely this applies to the entire proceeding. To hold otherwise would mean that the individual accused nullified his constitutional rights by failure to claim them out of ignorance.

CONCLUSION

Therefore we respectfully submit this Court exercise its supervisory powers and grant review on one or all of these questions.

Respectfully submitted,

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APPENDIX

Opinion of the Appellate Court

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in a bench trial finding defendant guilty of voluntary manslaughter of his wife, Mary Ann Ross, and of attempt to commit the murder of Martin O'Donnell. Defendant was sentenced to concurrent terms of not less than two nor more than fourteen years in the Illinois State Penitentiary.

CONTENTIONS ON APPEAL

1. Defendant was not proven guilty beyond a reasonable doubt.

2. The judgments on the two indictments were inconsistent and must be reversed.

EVIDENCE

Testimony of Martin O'Donnell, for the State

He is a pharmacist and part owner of Renneckars, Inc., a drugstore. Mary Ann Ross was working for him on June 9, 1965, and had been in his employ for about six months. On June 9, 1965, she worked a nine to six day; she returned to the store at about 9:30 that evening and then went to a tavern across the street. At about 11:00 o'clock he went to the tavern and saw her sitting with Walter Bauer and Bob Anderson. They all remained in the tavern for about another forty-five minutes at which point Mary Ann Ross asked if someone would follow her home, and he volunteered.

He had never been to Mary Ann Ross' home before and found it only by following her there. She arrived at home and parked her car in the rear of the apartment

building, and he pulled his car in front of hers. She got out of her car and came over to the passenger side of his car. He is not sure if she got into the car. At that time defendant, Mary Ann Ross' husband, came up to the witness' car, grabbed Mary Ann Ross by the left hand and started to stab her. Defendant said something to the effect that so this is the guy, and Mary Ann said "No, this is Marty."

He did not see a knife in defendant's hand immediately; he saw it only after defendant had hit Mary Ann several times. When he realized what was happening he tried to reach over and grab the knife. There were sample boxes in the middle of the front seat but he was able to reach over and take the knife from the defendant. Defendant had the knife in his right hand and tried to strike the witness as witness reached for it. Witness was hit with the knife on the right side of the chest. He was able to pull the knife from the defendant's grasp by prying open his fingers. Witness then opened the car door and threw the knife across the road. Defendant struck Mary Ann at least three or four times.

After witness got rid of the knife he started to walk around the car, and defendant started to walk away very fast. A young man came up and helped lift Mary Ann into his car, and then drove her to the hospital.

Testimony of Edward Cooper, for the State

He is a soldier in the United States Army and lives at 1728 Greenwood Avenue in a rear corner apartment on the second floor. He returned home early in the morning of June 10, 1965, and was attracted to his window by the sound of a car door slamming outside. Looking out of his window he saw two people sitting in a car and also saw defendant creeping toward the car. Defendant came around the corner of the building, walked up to the car, jerked the door open, yelled something about his wife and lunged into the car. There was a scuffle in the car and then a man got out of the driver's side of the

car and threw something across the street into the field. Defendant then got out of the passenger side of the car "dragging the woman and dropped her." As the woman lay on the ground defendant walked away. After O'Donnell threw the object, "he said to call the police."

He did not see a knife nor did he ever see defendant strike a blow.

Stipulation of Testimony of Dr. E. Tapia

The parties stipulated that Dr. E. Tapia is a pathologist employed by the Coroner of Cook County and that if he were called as a witness he would testify that he conducted an internal and external examination on the body of Mary Ann Ross and that he would further testify that the cause of death of this person was a stab wound of the heart.

Testimony of Wayne Kendall, for the State

He is a detective on the Cook County Sheriff's Police. At about 1:15 A.M., in response to a call, he arrived at the rear of an apartment building in the 1700 block of Greenwood in an unincorporated area of Northfield Township. After speaking to Edward Cooper he searched the field just west of the apartment building. He found a knife in the field about twenty-five yards west of the driveway of the apartment building. He did not test for fingerprints nor did anybody else because the handle of the knife was of a grained wood which, he was taught at the Police Academy, does not retain fingerprints; he did not check the blade because it was stuck into the ground with only one-half inch showing.

Testimony of Peter Ross, defendant

He is fifty-three years old, has never been before a judge except for traffic violations and has been in the dairy business for some thirty years as a driver. Mary Ann Ross, the deceased, was his second wife. They had

been living separately since the previous May when Mary Ann Ross moved to 1728 Greenwood with her three children by a previous marriage. He had seen her every day since the separation, save about three, and he frequently brought milk and water for her and the children.

He had lunch with his wife on June 9, 1965. He then went to his wife's home and stayed with the children until 5:00 P.M. before going to his home. His wife called him that evening and they made arrangements to go shopping the next day. At ten that evening he returned to his wife's apartment with some water, milk and a pie. She was not home when he arrived, so he waited for her expecting that she would return momentarily. He did not go into the apartment at first because he expected her to return momentarily; he waited in his car. Later he went back upstairs but the lights were out and he did not go in because he did not want to waken the children.

At about 1:05 A.M. he was sitting almost at the top of the stairs waiting. She drove up at that time and another car pulled in right behind her. She walked up to the other car and said: "I told you, hon, not tonight," and he said: "Oh, come on, get in here." He then walked toward the car and saw his wife and the other man in a huddle, making love. He watched for a minute and then opened the door on the passenger side and said: "Come on, this is my wife." She tried to kick him and said: "Marty, please, get him away from me." She kept kicking at him and hanging onto the other man.

As his wife was kicking at him, O'Donnell (the other man) picked himself up and had something in his hand. Defendant did not realize that it was a knife at first but grabbed O'Donnell's hand and pinned it to the steering wheel. Defendant was slipping on the asphalt but regained his balance and got into the car where he was able to brace himself against the door and shove O'Donnell's hand backward so that the knife went out of his hand off his left shoulder and out of the car some fifteen

to twenty feet. Defendant realized that O'Donnell had a knife during the struggle. The knife did not belong to defendant and he had never seen it before the night his wife was killed. During the fight he received cuts on his hands requiring fourteen stitches to close.

After the knife was out of the car defendant asked his wife if she was hurt and she said no; she was swearing at him. He asked her to drive him to the hospital because his hands were bleeding and she refused. He pulled her away from O'Donnell towards the right side of the car; O'Donnell started to get out of the car at about this time. Defendant got out of the car and began to plead with his wife to either let him drive her to the hospital or for her to drive him there. He decided not to go upstairs because he did not want to alarm the children. He finally turned back to his wife and asked her if she was coming and then said he was going to have her declared an unfit mother. He then walked towards his car. About twenty feet away he turned back because his wife might have changed her mind but she was sitting in the car staring at him. He then drove to his home in Highland Park. At 5:00 A.M. he was taken to the hospital for treatment.

He did not see his wife or O'Donnell get stabbed. If either got hurt it was accidentally in the course of the struggle.

OPINION

Defendant first contends that he was not proven guilty beyond a reasonable doubt because the evidence of the prosecution is improbable, unconvincing and contrary to human experience (*People* v. *Ware*, 23 Ill. 2d 59; 62). He rests his argument on two basic facts: (a) the fact that O'Donnell threw the knife away; and (b) the fact that defendant received cuts on his hands requiring fourteen stitches.

Defendant argues that O'Donnell threw away valuable evidence when he threw the knife from the car and rea-

sons that this is puzzling conduct at best but is generally the action of a guilty individual. We find the conduct of O'Donnell to be quite natural in the circumstances. Mary Ann Ross had already been seriously injured with the knife, and O'Donnell had been nicked close to the heart; it is highly reasonable action to put the dangerous instrument out of reach of the aggressor. Thus once O'Donnell had taken the knife from the defendant the logical thing to do was to throw it completely out of his reach and prevent any further injury. O'Donnell said he *threw the knife;* Cooper saw him *throw* it; defendant testified that he shoved O'Donnell's hand backwards "so the knife went out of his hand off his left shoulder" and that the knife went not more than fifteen or twenty feet. The police officer, minutes after the struggle, found the knife twenty-five yards away buried into the ground with one-half inch of the blade above the ground. The trier of fact could find that it was the defendant's evidence not the State's that was improbable.

Defendant also argues that since he received a fourteen stitch cut while O'Donnell received only a slight nick, it shows that O'Donnell must have been wielding the knife in the first instance. This is not necessarily true. O'Donnell could well have received his cut when defendant lunged at him and defendant could have been cut when O'Donnell took the knife from him. Indeed, O'Donnell's testimony is consistent with just such an interpretation. O'Donnell testified that he grabbed the knife by the handle and ripped it out of defendant's grasp; in the process of so doing, with the defendant still trying to clutch the knife, defendant could easily have gotten his hand badly cut. Furthermore, Cooper testified that O'Donnell told him to call the police and that defendant drove away.

In determining the credibility of O'Donnell and defendant the court placed great reliance on the testimony of Cooper. Although he did not see the stabbings which occurred inside the automobile, Cooper's testimony sharply contradicts defendant's account of the incident.

Defendant testified that he was sitting at the top of the stairs when the cars drove up; that he walked down a couple of steps and noticed that the occupants of the car were in a huddle; that he walked over to the car and watched them for about a minute and then opened the door. Cooper testified that he saw defendant "creeping around the corner of the building directly under my window . . . [h]e came around the corner and walked up to the car and jerked the door of the car open . . . ."

Next defendant testified that after the knife was out of the car he asked his wife if she was all right, that he asked her to drive him to the hospital, that she refused and swore at him, that as he was returning to his car he looked back and saw her sitting in O'Donnell's car staring at him. Cooper, however, testified that defendant dragged Mary Ann Ross out of the car and that she lay on the sidewalk as defendant walked away. O'Donnell also testified that when he got around the car Mary Ann Ross was lying on the ground.

The court could also find it unbelievable that an estranged husband who had lunch with his wife and who thereafter received a phone call from her "because we were supposed to go shopping again" waited in front of her apartment from 10:00 P.M. to 1:05 A.M. although he had seen her car parked in front of the drug store. These actions were more consonant with jealousy than with shopping.

In *People* v. *Clemons*, 26 Ill. 2d 481, 484, the court stated:

> [W]here a case is tried by the court without a jury, the determination of the credibility of the witnesses and the weight to be accorded their testimony is committed to the trial judge; and, unless it can be said that the court's judgment is found to rest on doubtful, improbable or unsatisfactory evidence, or clearly insufficient evidence, a reviewing court will not substitute its judgment for that of the court below even though evidence regarding material facts is conflicting and irreconcilable. (*People* v. *West*, 15 Ill. 2d 171.)

The record in this case compels agreement with the conclusion of the trial court that defendant was guilty of the voluntary manslaughter of his wife.

Defendant secondly contends that the judgments on the two charges are inconsistent and must be reversed or in the alternative, that the conviction of attempted murder must be reversed. He argues that voluntary manslaughter is devoid of intent while attempted murder specifically requires intent; and since the voluntary manslaughter of his wife and the attempted murder of O'Donnell arose from the same acts committed at virtually the same time, there is a logical inconsistency between the judgments.

The definition of Voluntary Manslaughter in the Criminal Code, Ill. Rev. Stat., ch. 38, § 9-2, in pertinent part shows it to be a crime without any element of intent:

> (a) A person who kills an individual without lawful justification if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
>
> (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.
>
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

The definition of Attempt, however, shows it to be a specific intent crime, Ill. Rev. Stat., ch. 38, § 8-4:

> (a) Elements of the Offense.
>
> A person commits an attempt when, *with intent to commit a specific offense,* he does any act which constitutes a substantial step toward the commission of that offense. (Emphasis added.)

The exclusion of an intent element from the definition of Voluntary Manslaughter and the specific inclusion of it in the definition of Attempt negates the possibility of the same acts supporting convictions for both crimes. See *People* v. *Weeks*, 86 Ill. App. 2d 480. However, the People contend that the stabbings of Mary Ann Ross and O'Donnell were separate acts; that there was a time interval between the voluntary manslaughter of Mary Ann Ross and the attempted murder of O'Donnell; and that during this interval the sudden and intense passion which led to the slaying of Mary Ann Ross ceased and the intent to kill O'Donnell was formed.

In *People* v. *Washington*, 27 Ill. 2d 104, 109, the court in distinguishing voluntary manslaughter from murder stated:

> [F]or if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder.

In the instant case the People's only witness to the actual stabbing, O'Donnell, testified:

> I did not immediately see a knife in defendant's hand. I saw one after he had hit the victim several times. I did not realize just what was happening and when I did I tried to reach over and grab the knife.
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> • • •
>
> After he hit her he tried to strike me while I was reaching for the knife and he hit me on the right breast.
>
> • • •
>
> When the defendant reached, he grabbed her right hand with his left hand and started to pull her when I realized that he did have a knife. I reached over and tried to grab it from him.

From this evidence we cannot find that the People proved that there was sufficient time "for the voice of reason and humanity to be heard" nor that defendant was proven guilty beyond a reasonable doubt of a specific intent crime—attempt to commit murder. (*People* v. *Coolidge*, 20 Ill. 2d 533.) The conviction for attempt to commit murder is reversed.

The conviction of defendant for voluntary manslaughter is affirmed and the conviction for attempt to commit murder is reversed.

AFFIRMED IN PART;
REVERSED IN PART.

McCORMICK, *P.J.*, and ENGLISH, *J.*, *concur*.